Supreme Court, U.S.
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No. 04-1143

In The Supreme Court of the United States

BANNER RESTORATIONS, INC.,

Petitioner,

v.

BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented in the employer Petitioner Banner Restorations, Inc.'s ("Petitioner" or "Banner") Petition misstate facts which bear on the issues which would be properly before the Court if certiorari were granted. (S.Ct. Rule 15.2) Respondents, Bricklayers Local 21 of Illinois Apprenticeship and Training Program and Masonry Institute Bricklayers Local 21 Pension Fund ("Respondents" or "the Funds"), suggest that accurate and fair statements of the questions presented are:

1. Did the Court of Appeals err in affirming a factual finding of the District Court following a bench trial that the employer Petitioner's claim that it submitted monthly reports and contributions to the Respondents for seven years solely because of union threats and coercion was not credible?

2. Did the Court of Appeals err in affirming the District Court's conclusion that the facts established that Petitioner's conduct manifested intent to be bound to area-wide collective bargaining agreements?

3. Does the proviso of 29 U.S.C. § 186(c)(5)(B) permitting payments by employers to an employee benefit trust fund "[*p*]*rovided* [t]hat . . . the detailed basis on which such payments are to be made is specified in a written agreement with the employer" require an employer's signature on a written agreement.

Petitioner's first question presented assumes that its payments of monthly contributions to the Respondent Pension Fund were "coerced" by threats "to interfere with the business of the employer" made by "Trust Fund Representatives." (Pet., p. *i*) This question assumes *sub silentio*

QUESTIONS PRESENTED – Continued

that the District Court erroneously found "not credible Ciancanelli's testimony that, as President of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor at trial while testifying on the issue, and considering" numerous other facts. (Pet. App. B, ¶ 18, pp. 27a-28a) The first and fifth questions also respectively misstate that "Trust Fund Representatives" and "Trust Funds" made such threats. The decisions of the courts below, and the parties' Stipulations, all state that threats to strike or picket were made by representatives of Local 21, the labor union, not the Respondent Trust Fund. (Pet. App. A, pp. 2a-3a; Pet. App. B, ¶ 8, p. 25a; Pet. App. D, ¶ 23, p. 44a)

Petitioner's second question posits whether "an area collective bargaining agreement [sic.] . . . manifest an intent to be bound *solely* by making monthly payments to Respondent Trust Funds, in the face of payments being coerced at the beginning of *each* job and in the absence of *any* language on the monthly [contribution] report forms incorporating all the terms of a Collective Bargaining Agreement . . . " (Pet., p. *i*) (Emphasis added) The decisions of the courts below, as well as the parties' Stipulations, all make clear that there were, in addition to making contributions for seven years, numerous other facts to support the conclusion that Respondent manifested an intent to be bound to the area collective bargaining agreement, including but not limited to language on monthly contribution reports stating, among other things, "[t]he undersigned agrees to the terms of payment to these

QUESTIONS PRESENTED – Continued

funds set forth in the current applicable Collective Bargaining Agreement . . . " (Pet. App. A, pp. 2a-5a, 10a-11a; Pet. App. B, ¶s 4, 5, 6, 7, 9-16, pp. 24a-28a; Pet. App. D, ¶s 11-16, 18, 21, 22, 24, 26-28, pp. 41a-46a)[1]

[1] The parties stipulated and the District Court found that "on a number of occasions over the years" Local 21 representatives visited various job sites and told Banner's President that he had to hire union workers, pay contract wage rates and contributions to the Funds. (Pet. App. D, ¶ 23, p. 44a; Pet. App. B, ¶ 8, p. 25a) Petitioner offers no record citation that Local 21 representatives visited "each" job site. The Court of Appeals did, however, acknowledge that Banner's President's son, who the District Court also found not to be a credible witness (*Id.* at ¶ 18, pp. 27a-28a), testified that they came to "nearly ninety per cent" of the work sites. (Pet. App. A, p. 3a)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit on the merits is reported at 385 F.3d 761 (7th Cir. 2004). The slip opinion is attached to the Petition, Appendix A. The Court of Appeals' October 5, 2004 decision denying Petitioner's motion to stay the mandate is reported at 384 F.2d 911 (7th Cir. 2004). The Court of Appeals' January 11, 2005 decision denying Petitioners' motion for reconsideration, construed as a Petition for Rehearing, appears at 2005 U.S. App. LEXIS 579 (7th Cir. 2005). The District Court's September 3, 2002 decision is unreported and is attached as Appendix B to the Petition.

STATEMENT OF THE CASE

I. Petitioner's "Statement Of The Case" Violates Rule 14.1(g)

This Court's Rule 14.1(g) requires the content of a Petition for certiorari to contain "[a] concise statement of the case setting out the facts material to consideration of the questions presented . . . " Respondent respectfully suggests that Petitioner's "Statement of the Case" completely fails to adhere to this Rule. Within its "Statement of the Case," Petitioner makes nothing but arguments, discussing numerous cases (Pet., pp. 4-5, 6, 7, 12, 13, 14, 15), that belong in a Rule 14.1(h) section amplifying the reasons relied on for allowance of the writ.[2] To the extent

[2] For example, Petitioner's Section II of its "Statement of the Case," entitled "There Is A Clear Conflict With The Second Circuit," doesn't mention a single fact or describe a single thing that occurred or

(Continued on following page)

facts are referred to, most appear in footnotes interspersed with Petitioner's arguments, and many facts are offered without any citation to the record.

For example, paragraph 4 of the Petition at pages 3-4 contains these factual representations:

> 4. Trust Fund Representatives engaged in threats and coercion including actual picketing and threats to shut the job down by going to the customers for whom the restoration services were performed, either [sic.] to the building managers or the owners. Threats were for the purpose of requiring Banner to use the union apprentice program (App. D, Stip. 21, 44a) to make monthly contribution reports and send in monthly checks to the Trust Funds (App. D, Stip. 29, 46(a)) . . .

Stipulation 21 at Appendix D, page 44a, states:

> 21. At least four to five times per year, Ciancanelli called either or both Local 21 and Local 21 Apprenticeship and Training Program to see if either had any apprentice bricklayers available for work. According to Ciancanelli, Local 21 and the Apprenticeship Program always were cooperative in providing bricklayers, if any were available.

Stipulation 29 at Appendix D, page 46a, states:

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was decided by the courts below. (Pet. 7-8) In Section IV, entitled "The Seventh Circuit Erroneously Relied Upon A Course of Conduct To Support An Agreement, *etc.*," there is a reference in footnote 9 on page 14 to, but no description of, a single stipulated fact and the balance of the section discusses in detail *Robbins v. Lynch*, 936 F.2d 330 (7th Cir. 1993), and cites five other decisions.

> 29. Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 Apprenticeship and Training program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so. (Emphasis added)[3]

There is no record evidence cited by Petitioner to support the statements that "Trust Fund Representatives" or anyone else "engaged in . . . actual picketing," or spoke to "customers," "building managers" or "owners."

Respondent respectfully suggests that even a cursory review of Petitioner's "Statement Of The Case" reveals such total non-compliance with Rule 14.1(g) that the Court may deny the Petition for this reason. Sup. Ct. Rule 14.4

II. The Facts

The Funds brought this action to compel an audit of Banner's books and records pursuant to the provisions of Sections 502(g)(2), (a)(3), and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1132(g)(2), (a)(3), and 1145. Jurisdiction in the District Court was based upon Sections 502(e)(1) and 502(e)(2) of ERISA, 29 U.S.C. Sections 1132(e)(1) and (e)(2). (R.1)

A counterclaim was filed by Banner seeking return of monies paid to the Pension Fund. The counter-claim was

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[3] This stipulation is at the heart of Petitioner's third question presented which claims error to the Court of Appeals' affirmance of the District Court's credibility determination that Respondent did not contribute to the Funds solely because of threats or coercion discussed *infra*.

brought under federal common law and sought return of monthly pension fund contributions made by Banner for seven years between June 1991 and March 1998 allegedly because of a mistake of fact or law. (R. 18) The alleged mistake of fact was that Banner's President did not know a signed contract was a requirement to make contributions and the alleged mistake of law was that Banner's contributions were allegedly unlawful without a signed written agreement. (Pet. App. B, p. 33a, n.5)

Following a bench trial, on September 3, 2002, the District Court issued written Findings of Fact and Conclusions of Law in favor of the Funds's request for an audit and against Banner on its counterclaim. The District Court held that the Funds were entitled to conduct a payroll audit of Banner's book and records for the period January 1, 1995 through September 3, 2002. (Pet. App. B, pp. 33a, 34a)

Consistent with the Stipulations and documents admitted at trial, the District Court and Seventh Circuit found the Funds were established pursuant to the terms of a collective bargaining agreement ("CBA") entered into between Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftsman and various parties, which incorporates Trust Agreements by reference, and which sets forth a detailed basis on which contributions to Respondent Funds must be made. From June 1991 through 1998, Banner submitted checks, signed by its President Charles Ciancanelli ("Ciancanelli"), and unsigned monthly fringe benefit contribution reports to the Funds, with the names and social security numbers of employees performing work covered by the CBA. Each year, Illinois District Council No. 1 sent Banner and all CBA signatories memoranda detailing the wage and

benefit rates for the year. For each year, Banner's contributions corresponded to the rates prescribed in the CBA. Banner also remitted union dues on behalf of its employees to Local 21. Some of the monthly contribution reports contained the following language:

> I hereby certify that this is a true report of all hours worked by Bricklayers and Bricklayer Apprentices during the month and includes no self-employed persons. The undersigned agrees to the terms of payment to these funds set forth in the current applicable Collective Bargaining Agreement and to the terms of the applicable Trust Agreements, and that dues remitted to District Council #1 were deducted only from the paychecks of bricklayers and bricklayer apprentices who have authorized such deductions in writing.

(Pet. App. B, ¶s 1, 4-6, pp. 23a-25a; Pet. App. A, pp. 2a-4a, 10a-11a; Pet. App. D, ¶s 15, 16, 18, 26, 28)

In February 1995, Banner cooperated in a payroll audit by the Funds pursuant to the CBA terms. No delinquencies were found. (Pet. App. B, ¶ 10, p. 25a; Pet. App. A, p. 4a; Pet. App. D, ¶ 27, p. 45a)

About four times per year, Banner requested bricklayers and apprentices from Local 21 and the Apprentice Program and, according to Ciancanelli, the Union and Apprentice Program were cooperative in providing bricklayers. Banner donated a truck and driver to the Apprentice Program in 1997. (Pet. App. B, ¶s 7, 12, pp. 25a, 26a; Pet. App. A, pp. 4a, 11a; Pet. App. D, ¶ 21, 22, pp. 44a, 45a)

In May 1998, Local 21 notified Banner that it had failed to remit union dues for an employee. Banner

responded by remitting the dues. (Pet. App. B, ¶ 14, p. 26a; Pet. App. A, p. 4a)

On several occasions, Local 21 representatives visited Banners job sites and told Ciancanelli that Banner had to hire members of Local 21, pay its employees union wages, and contribute on behalf of its employees to Plaintiffs. Representatives of Local 21 warned Ciancanelli that if Banner failed to do this, Defendant's jobs would be shut down or Local 21 would picket Defendant's job sites. On one occasion, Ciancanelli was asked to assume responsibility for the wage and benefit obligations of another employer working on the same site as Banner. Local 21 representatives repeatedly asked Ciancanelli to sign the CBA, but at no time while he was President, did he do so. (Pet. App. B, ¶s 8, 9, 17, pp. 25a, 26a; Pet. App. A, pp. 2a-3a; Pet. App. D, ¶s 10, 23, 24, pp. 41a, 44a, 45a)

In 1997, 1998 and 1999, Banner was notified of hearings before the Joint Arbitration Board of the Bricklayers concerning charges of CBA violations. After each hearing, the Arbitration Board found CBA violations at a job site in Romeoville, Illinois and, after the 1999 hearing, ordered Banner to pay damages. Banner did not challenge any of the Joint Arbitration Board decisions, nor did it pay damages. (Pet. App. B, ¶s 11, 14, 15, 16, pp. 26a, 27a; Pet. App. A, p. 4a; Pet. App. D, ¶s 11-14, pp. 41a, 42a) At the arbitration and trial, Petitioner Banner Restorations, Inc. argued that it had no relationship to a company known as "Banner Restorations" which was the company named in the arbitration, whose President Irwin Axelrod signed a collective bargaining agreement with Illinois District Council No. 1 on a date after June 1, 1990. Ciancanelli worked for Axelrod for about ten years until 1990. (Pet., p. 9; Pet. App. D, ¶s 7, 8)

Regarding Banner's assertion that he was "coerced" to do the foregoing by threats of strike and pickets, the District Court also made the following factual finding:

> 18. After review, this Court finds that Ciancanelli, as President of Defendant, did not perform any of the acts narrated above solely in response to Local 21's threats of work stoppages and pickets. This Court finds not credible Ciancanelli's testimony that, as President of Defendant, he sent in the contribution reports, paid union wages and fringe benefit contributions, etc., solely in response to Local 21's threats of work stoppages and pickets considering his demeanor and his son's demeanor at trial while testifying on the issue, and considering that he hired employees through Local 21, that Local 21 asked him to assume responsibility for the correct and timely payment of wages and fringe benefit contributions of another employer working at General Jones Armory, that he donated a truck and driver to Local 21's Apprenticeship and Training Program, and that he continued on his course of conduct for approximately seven years without complaining to any agency or similar authority; even in the face of three adverse decisions and an order to pay damages by the Joint Arbitration Board.[3]
>
> [3] Even assuming some type of link between Local 21's threats of work stoppages and pickets and Defendant's conduct from June 1991 through March 1998 (thereby finding Ciancanelli's and his son's testimony credible to some extent), this Court does not believe that such conduct by Local 21 offers Defendant any solace. Defendant has not explained how Local 21's threats resulted in

> Defendant's involuntary adherence to the terms of the Collective Bargaining Agreement for approximately seven years and why Defendant had no alternative but to continue adhering to the terms of the Collective Bargaining Agreement for approximately seven years under the circumstances. (citations omitted) On this point, Judge Easterbrook's comments in *Robbins v. Lynch*, 836 F.2d 330, 333 (7th Cir. 1988), are noteworthy: "Unions frequently decline to work unless the employer adheres to a collective bargaining agreement. The threat of 'no agreement, no work' hardly makes adherence to the agreement involuntary . . . "
>
> To the extent Defendant relies on Local 21's threats of work stoppages and pickets to make out a violation of 29 U.S.C. § 158(b), Defendant should have filed a claim before the National Labor Relations Board. (citations omitted) The National Labor Relations Board has jurisdiction over such claims.

(Pet. App. B, ¶18, pp. 27a-28a) (Footnote 2 omitted)

The District Court concluded that the Funds established that Banner, by its conduct, had adopted the CBA although Banner never signed it. The District Court further ruled that the CBA, which incorporates trust agreements by reference, satisfies the written agreement requirement of 29 U.S.C. § 186(c)(5) and that the "written agreement" required by the statute need not be signed by the employer. (Pet. App. B, pp. 29a-34a)

The Court of Appeals affirmed all of the District Court's legal conclusions on the same grounds as the

District Court. It rejected Banner's contention, made again in this Court in Petitioner's third question presented and reargued in Petitioner's "Statement Of The Case," that "[m]ost importantly, the Stipulation sets forth that Banner Restorations in paragraph 29 "submitted the monthly contribution reports and contacted Local 21 or the Local 21 Apprenticeship Training Funds for workers in response to threats by Local 21 Representatives to shut his job down if he did not do so. (46a)" The Court of Appeals rejected this argument, stating:

> Banner invites us to reject the district court's credibility determination on the ground that it is contrary to the parties agreed stipulations. In particular, Banner asserts that the parties stipulated that "Ciancanelli . . . submitted the monthly contribution reports in response to threats . . . to shut his jobs down if he did not do so." Appellant's Br. at 17, n.10.

Banner's purposeful omission is misleading. Stipulation No. 29 actually reads:

> Ciancanelli *asserts* that he submitted the monthly contribution reports and contacted Local 21 and/or the Local 21 Apprenticeship and Training Program for workers in response to threats by Local 21 representatives to shut his jobs down if he did not do so.

R.50 at 8 (emphasis added). Thus, Banner's complaint regarding the court's credibility determination rings hollow. That determination was consistent with the agreed stipulation and well within the district court's discretion.

> We note further that Ciancanelli's assertion is not supported by objective evidence in the record. For instance, during the seven-year relationship, Banner never complained to an appropriate authority about the alleged acts of the union representatives, nor did it indicate, for instance, on its monthly contribution checks, that it paid the amounts only under protest. For this additional reason, we accept the district court's credibility determination.

(Pet. App. A, p. 12a)

REASONS THE WRIT SHOULD BE DENIED

I. Petitioner's "Coercion" Claim Is A Factual Determination Unworthy Of Review

We turn first to Petitioner's contention that it complied with an area-wide collective bargaining agreement for seven years, paying monthly contributions to the Funds, remitting dues to the Union and hiring union workers because of union "coercion." This argument is based entirely upon the contention that the Funds stipulated to that fact. Banner cites no testimony of Ciancanelli, the President of Banner, or his son, the only persons who testified, to make this argument. The Court of Appeals' response to Banner's "purposeful omission" from Stipulation No. 29 set forth immediately above (Pet. App. A, p. 12a), which is repeated by Banner in its argument to this Court (Pet., ¶ 15, p. 12), says it all and should say enough.

Banner argues in footnotes 7 and 8 of its Petition at pages 10 and 11 that the terms "states" and "asserts" should not mean what they say because "the Form" of

Stipulations No. 23 and 29 "were drafted by Respondent's counsel" and other stipulations which "favor Respondents" do not use the words "asserts" or "states." (Pet., n.8, p. 11) This argument is another "purposeful omission" and also rings hollow. The last sentence of Stipulation No. 23, which reads, "Ciancanelli *states* that [Local 21 representatives] also said he had to sign an agreement, which he refused to do" was "an additional sentence written in . . . at the request of [Petitioner's counsel.]" (Pet. App. D, n.3, p. 44a) Then Petitioner offers more unsupported assertions that "it in good faith believed" all Stipulations were "determinative," and the parties stipulated to each statement as "Facts." (Pet., n.8, p. 11) But the Stipulation's preamble says, the parties "do hereby stipulate and agree *as follows*." (Pet. App. D, p. 39a) (emphasis added) Petitioner's appeal to logic also fails because it does not consider an equally plausible reason – that Petitioner was unable to negotiate a more "determinative" stipulation.

And for the legal reasons stated by both the District Court and the Courts of Appeal, Banner's "coercion" Stipulation No. 29, even if construed as Banner requests, is meaningless in light of objective facts. In *Robbins v. Lynch*, 936 F.2d 330, 333 (7th Cir. 1988), an employer's attempt to explain away its compliance with an unsigned collective bargaining agreement, partially on the ground that the union had threatened to strike, was rejected, the court stating:

> The threat to strike is unexceptional. Unions frequently decline to work unless the employer adheres to the collective bargaining agreement. The threat of "no agreement, no work" hardly makes adherence to the agreement involuntary, as [the employer] suppose. This is the threat, express or

> implied, of every contractual negotiation. (E.g., "Unless you pay my price, I won't sell you my iron ore.")

Both the Court of Appeals and the District Court also noted, with respect to the threat to picket, that Banner never once complained to the National Labor Relations Board or any other authority. (Pet. App. A, p. 13a; Pet. App. B, n.3, p. 28a) Banner responds to neither of these observations in its Petition.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S.Ct. Rule 10. Petitioner certainly hasn't made much of a case to depart from this principle here.

II. The Lower Courts' Conclusions That Banner Adopted The Area-Wide Are Supported By A Preponderance of the Evidence

Whether or not a collective bargaining agreement has been reached between two parties is a question of fact. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982); *NLRB v. Truckdrivers, Chauffeurs & Helpers*, 532 F.2d 569, 571 (6th Cir. 1976), *cert. den.*, 429 U.S. 859 (1976). In federal labor law cases not involving § 186(c)(5),

> It is well settled that a union and employer's adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound. See, e.g., *Certified Corp. v. Hawaii Teamsters Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979); *Warrior Constructors, Inc. v. Operating Engineers Local 926*, 383 F.2d 700, 708 (5th Cir. 1967); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952). Instead, what is required is conduct manifesting an intention to abide by the terms of an agreement. See, e.g., *Warrior Constructors*,

> *Inc.*, *supra*, 383 F.2d at 708-09; *NLRB v. George E. Light Boat Storage, Inc.*, 373 F.2d 762, 766 (5th Cir. 1967); *Rabouin*, *supra*, 195 F.2d at 909-10.

NLRB v. Haberman Const. Co., 641 F.2d 351, 355-56 (5th Cir. 1981) (*en banc*) It has also long been the rule in the Seventh Circuit in cases arising under both the NLRA and cases involving § 186(c)(5). (Pet. App. A, p. 8a)

Haberman involved facts as close to this case as is possible. A construction contractor which had never executed a collective bargaining agreement with the union and was not a member of the area-wide contractors association ("AGC") which negotiated the area-wide agreement was found to have adopted the area-wide agreement by its conduct.

> Although the Company never formally executed a collective bargaining agreement with the Union, and despite the fact that respondent was not a member of the AGC, by May 1973 respondent was remunerating its carpenters at the pay scale provided by the Union-AGC contract. Furthermore, when this contract expired on August 31, 1974, and was replaced by a contract effective from September 1, 1974, through March 31, 1977, the Company instituted the new contract's higher wage scale. The Company also submitted payments for its carpenters' benefits to the Union and allowed the employees to maintain a job steward at the worksite.[4]

Haberman, 641 F.2d at 355.

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[4] Although there was no evidence that a union "steward" was employed by Banner, the parties did stipulate that Banner employed the son of a Local 21 business representative who, at the time of trial, was president of Local 21 and the District Council. (Pet. App. D, ¶ 20, p. 44a)

Petitioner's argument, again found in its "Statement Of The Case" and relegated to a footnote, that all of the facts relied upon by the lower courts, to which Petitioner unambiguously stipulated, to conclude that it had adopted the area-wide agreements were "isolated incidents," except for its payments of contributions to the Funds for seven years, finds no legal support and Petitioner cites none. (Pet., n.5, pp. 5-6). The only undisputed fact Petitioner cites to support its argument that it never adopted the area-wide collective bargaining agreements is its refusal to do so. It is difficult to imagine how any contract by adoption case would ever be litigated if, at some point prior to litigation, the employer or union did not refuse to sign a collective bargaining agreement with the other. The only other argument Petitioner offers to minimize all of the objective evidence of intent is its "hollow" argument that the Funds stipulated that Banner complied with the terms of the agreement because of coercion.

The record facts establish that for seven years Petitioner has complied with a collective bargaining agreement in exchange for labor peace and, during that time, complained to no authority that it was being unlawfully required or coerced to hire union workers, pay union wages, remit union dues, donate a truck and driver to one of the Respondents, submit to an audit and the other indications of harmonious co-existence with the union and the Funds found by the courts below. Petitioner does not identify a single provision of the agreements it failed to comply with. Petitioner does not cite a single case with this kind of evidence to support its contention that the evidence was insufficient for the trier of fact to conclude that it had voluntarily adopted and agreed to be bound by the CBA. The Petitioner's fourth question presented does

not raise an issue of law. And even if this Court were inclined to accept a case concerning the contract by adoption principle, a part of federal labor law jurisprudence for more than fifty years, to consider a place along the spectrum of potential factual scenarios to draw a line, this is not that case.

III. 29 U.S.C. § 186(c)(5) Does Not Have A Signature Requirement

To reduce the verbiage, Petitioner's argument in support of granting its writ on the question whether a signed agreement is a requirement of § 186(c)(5) boils down to two propositions. First, must there exist at sometime in the history of dealings between an employer and an union a *signed* agreement in which "the detailed basis on which such payments are to be made [by an employer to a trust fund] is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5) The second question is whether the Second and Seventh Circuits disagree on the first proposition.

Petitioner states that "there is no requirement that the written agreement be a signed written agreement." (Pet., ¶ 41, p. 21) That would seem to be the end of the matter. But Petitioner goes on to qualify this seemingly determinative admission by stating, "but the written agreement does have to be with the employer of the employees involved and there is no such written agreement here. A Court cannot simply accept as a written agreement an area agreement entered into by other employers or a multi-employer group with a labor organization but which this employer specifically refused to sign." (*Ibid.*) What's the problem with an area-wide

agreement or national master agreement, for that matter? Both typically, and the CBA at issue here indisputably, specify a detailed basis on which contributions are to be made to trust funds which are indisputably legitimate trust funds. Petitioner doesn't say.

Rather, Petitioner discusses the numerous cases cited by the Seventh Circuit's opinion and claims there is but a single common thread that reconciles them all with the Second Circuit's pre-ERISA decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969), which appears to be one of the first appellate court opinions construing the "written agreement" requirement of § 186(c)(5). That single common thread is, according to Petitioner, that in every decision except for *Moglia* there existed, somewhere in the historic dealings between the union and the employer or Trust Fund at least one *signed* written agreement.[5]

So, though admitting that "there is no requirement that the written agreement be a *signed* written agreement," Petitioner contends there is such a requirement. According to Petitioner, the policy behind the statute is violated if the employer never signed a written agreement, but if he signed a written agreement any time in the past, the signature requirement is satisfied. Exactly why that's so is never clearly stated by Petitioner. The question is, why is it lawful if an employer signed an agreement with an union and thereafter knowingly refused to re-sign, but

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[5] Petitioner states, "In all those cases at some point earlier in time, there was in fact a written agreement entered into by the employer for his employees, either in the form of a letter of intent or being bound to a multi-employer bargaining agreement which were [sic.] *signed* by the employer." (Pet., p. 6)

continued to comply with the agreement any more satisfactory under the statute than an employer who never signed, but knowingly and intentionally, to maintain labor peace complied with a collective bargaining agreement?

In other words, Petitioner requests this Court to construe § 186(c)(5) as follows: "[*p*]*rovided*, That . . . "the detailed basis on which such payments are to be made is specified in a written agreement with the employer *that has been signed sometime in the past by the employer.*" Otherwise, says Petitioner, "[t]o permit a course of conduct beyond that circumstance invites problems of extortion addressed by this Court in *Arroyo v. United States*[,]" 359 U.S. 419 (1959). (Pet., ¶ 46, p. 24) With all due respect, Respondents simply do not see why an union employer which went non-union an indeterminate number of years in the past is less susceptible to "extortion" by an union representative that an employer that never signed a written agreement, where both employers at the relevant time, to maintain labor peace, knowingly and intentionally comply with an area-wide collective bargaining agreement.

It should go without saying that a manifestation of intent to be bound to a labor agreement by the signature of an employer an indeterminate number of years in the past is not determinative of its intent to be bound once the agreement expires. It is, of course, and must be the employer's conduct following expiration during the relevant period that is determinative of its adoption of successive agreements. That requires the same kind of evidence as required in this case. Petitioner requests this Court to read an undefined, if not undefinable, signature requirement into a criminal statute which is to be strictly construed. This Court has been offered not a single good reason to depart from the rule that "[i]t is the legislature,

not the Court, which is to define a crime, and ordain its punishment." *Arroyo v. United States*, 359 U.S. at 424, quoting, *United States v. Wiltberger*, 5 Wheat 76, 95 (1820); and citing, *United States v. Halseth*, 342 U.S. 277 (1952); and *Krichman v. United States*, 256 U.S. 363 (1921).

The Petitioner's second proposition that the Seventh and Second Circuits are in conflict as to whether § 186(c)(5) should be construed as Petitioner urges should not detain us much longer. In *Brown v. C. Volante Corp.*, 194 F.3d 351 (2d Cir. 1999), the Second Circuit both aligned itself with the Seventh Circuit on the issue presented by this Petition and distinguished its-decision in *Moglia v. Geoghegan*, *supra*, upon which Petitioner's entire argument is constructed, stating:

> The Trustees satisfied their initial burden to demonstrate the absence of a genuine issue of material fact as to whether appellant adopted the two unsigned CBAs . . . The sixty-one remittance reports – most of which were expressly submitted "in accordance with the terms of" the CBAs – appellant's cooperation with the audit, its payment of union wages to employees, and Volante's letter to the Trustees acknowledging appellant's "responsibility to the funds," are sufficient, absent contrary evidence, to establish as a matter of law appellant's intent to adopt the two unsigned CBAs. See, e.g., *Robbins v. Lynch*, 836 F.2d 330, 332 (**7th Cir.** 1988) (granting summary judgment to trustee of funds on claim that employer breached adopted agreement; noting, among other things, that employer "paid the union scale . . . and paid (some) pension and welfare contributions"); *Trustees of Atlanta Iron Workers, Local 387 Pension Fund v. Southern Stress Wire*

Corp., 724 F.2d 1458, 1459-60 (11th Cir. 1983) (per curiam) (upholding finding that employer adopted CBA and agreement to contribute to benefit fund; noting employer's payment of union wages, submission of benefit reports, and accession to audit).

Appellant argues that the unsigned CBAs do not satisfy the ERISA Section 302(c)(5)(B) requirement that payments to a trust fund be made pursuant to a "written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). According to appellant, it did not make a "written agreement" to contribute to the Fund after June 30, 1990 because it did not sign the two subsequent CBAs. Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. Id. *Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement.*[n1] *See Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370, 375 (**7th Cir.** 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement'").*

> [n1] *Our decision in Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), is not to the contrary.* There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. *403 F.2d*

> *at 114, 115.* We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, *on the facts of that case*, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id. at 118. We did not, however, graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in Moglia, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.*

Brown v. C. Volante Corp., 194 F.3d at 355. (Bold and underline emphasis added) Not much of a disagreement here. *See*, Seventh Circuit opinion in this case, citing same cases as *Brown*, and citing *Brown*. (Pet. App. 8a, 9a, 17a, 18a, n.8) *Accord, National Leadburners Health & Welfare Fund v. O.G. Kelley & Co.*, 129 F.3d 372, 375 (6th Cir. 1997) ("The statute does not specify any signature requirement and the term 'written agreement' is unambiguous in relation to such.")

The Second and Seventh Circuits have unambiguously stated they agree with each other. Neither agrees with Petitioner. There is no conflict to resolve and absolutely no reason, in logic or law, for this Court to grant Petitioner's writ. This is an unremarkable case.

CONCLUSION

For the foregoing reasons, Respondents request that the Supreme Court deny certiorari.

Respectfully submitted,

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